Supreme Court, U.S.
FILED

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No.
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1996

IVANI CONTRACTING CORP.,

Respondent,

-against-

THE CITY OF NEW YORK, et al.,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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March 4, 1997

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31 pp

QUESTION PRESENTED

May laches be interposed as a successful defense to an action for an alleged civil rights violation before the expiration of the statute of limitations where the plaintiff, the lowest bidder for two City contracts, was apprised long before the award of the contracts and long before the order to commence work was issued on either contract, that it would not be awarded the job, and plaintiff did not seek either by way of state remedy or injunctive relief in federal court an order awarding it the contract or staying the award and construction of the projects involved, but, instead, without explanation, waited until the City had paid out over $3,000,000 for both projects which had been completed, before it brought its civil rights lawsuit seeking as damages the loss of profits for contracts for which it had no vested rights, under state law, thereby raising the possibility that municipal funds would have to pay twice for the projects?

PARTIES TO THE PROCEEDING

The parties in this case when it commenced were as follows:

1. Ivani Contracting Corporation, plaintiff.

2. The City of New York, defendant.

3. David N. Dinkins, in his official capacity as Mayor of the City of New York, defendant.

3. Michael C. Rogers, in his official capacity as Chief Procurement Officer of the City of New York, defendant.

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JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered on January 7, 1997. The jurisdiction of this Court is invoked under the provision 28 U.S.C. § 1254(1). This petition has been filed within the time allowed by law.

STATUTORY PROVISIONS

42 United States Code § 1983

§ 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom of usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

General Municipal Law § 50-e

50-e. Notice of claim

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the

commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

General Municipal Law § 103(1)

103. Advertising for bids; letting of contracts; criminal conspiracies

1. Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than twenty thousand dollars and all purchase contracts involving an expenditure of more than ten thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district, to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section. In any case where a responsible bidder's gross price is reducible by an allowance for the value of used machinery, equipment, apparatus or tools to be traded in by a political subdivision, the gross price shall be reduced by the amount of such allowance, for the purpose of determining the low bid. In cases where two or more responsible bidders furnishing the required security submit identical bids as to price, such officer, board or agency may

award the contract to any of such bidders. Such officer, board or agency may, in his or its discretion, reject all bids and readvertise for new bids in the manner provided by this section.

New York City Charter § 313(b)(2)

(b) 2. The agency letting the contract may reject all bids if it shall deem it for the interest of the city so to do; it shall, without other consent or approval, award the contract to the lowest responsible bidder, unless the mayor shall determine in writing, justifying the reasons therefor, that it is in the best interest of the city that a bid other than that of the lowest bidder shall be accepted. Such determination shall be filed with the procurement policy board and published in the City Record. Tie bids shall be decided by the agency letting the contract and the award made. Whenever a contract is awarded to other than the lowest bidder because the lowest bidder is determined by the agency not to be a responsible bidder or because the lowest bid is determined by the agency not to meet the requirements and criteria as set forth in the invitation for bids, the agency making such determination and awarding such contract shall immediately notify the lowest bidder of such determination and shall file in the agency contract file a statement in detail of the reasons therefor and shall submit copies of such determination to the procurement policy board.

New York City Charter § 1304(a)

§ 1304. **Division of Economic and Financial Opportunity.** There shall be a division of economic and financial opportunity within the department.

a. The purpose of the division shall be to enhance the ability of minority and women owned business enterprises to compete for city contracts, to enhance city agencies' awareness of such business enterprises, and to ensure their meaningful participation in the city procurement process.

11 Rules of the City of New York § 3-09(a)

§ 3-09 MBE/MBE Price Preferences

(a) In the case of contracts for goods, services or construction to be let by competitive sealed bidding, the agency may state in the invitation to bid that if the lowest responsible bid is submitted by a person who is not a certified firm and there is another bid within the "target percentage" of bid offered by the lowest responsible bidder from either a person that is so certified or a qualified joint venture, as defined in section 3-02 of these rules, the agency shall refer such bid and the lowest responsible bid to the Major, or such other official as may exercise such power pursuant to section 310 of the New York City Charter, for a determination pursuant to subdivision b of section 313 of such charter of whether it is in the best interest of the City that the contract shall be awarded to other than the lowest responsible bidder. The "target percentage" shall be 10% unless the contracting agency

determines, and states in the invitation for bids, for reasons which shall be documented in the contract file, that a different percentage is appropriate for the particular contract.

(b) Except as directed by the Mayor, or such other official as may exercise the power described in section 313 of the Charter, the technique described in this section shall not be utilized for contracts for goods, services or construction in excess of five million dollars.

(c) Nothing in these rules shall be deemed to restrict or diminish the powers conferred on any official pursuant to section 313 of the Charter.

STATEMENT OF THE CASE

(1)

Plaintiff, a construction company owned by men of Italian descent, sued the City of New York, David N. Dinkins, as mayor of the City, and Michael C. Rogers, as the City's Chief Procurement Officer, in Federal District Court alleging a federal cause of action pursuant to § 1983 and a state cause of action under § 103 of the General Municipal Law of New York, which establishes conditions for competitive bidding of public contracts. Plaintiff alleged that the defendants had discriminated against it on the basis of race and/or gender by awarding contracts for which it had submitted the lowest bids to contractors owned by minorities and/or women. Plaintiff seeks damages in the amount of $1,075,000 for lost profits at not having been awarded the contracts and $10,000,000 in punitive damages,

legal fees, costs and interest.

The United States District Court for the Eastern District of New York dismissed the complaint against the City of New York (hereafter referred to as "the City") on the ground of laches. The District Court also dismissed plaintiff's claim for punitive damages as unsupported by the record.

The United States Court of Appeals for the Second Circuit reversed and held that laches is not available to bar plaintiff's legal claim for damages under § 1983. Having reinstated plaintiff's federal claims, the Circuit Court also reinstated plaintiff's state claims. However, the Circuit Court affirmed that portion of the District Court's order dismissing the claims for punitive damages.

(2)

Section 1304(a) of the New York City Charter directed the City of New York to "enhance the ability of minority and women-owned business enterprises to compete for City contracts, " . . . and "to ensure the meaningful participation in the City procurement process." Pursuant section 1304(c), the New York City Department of Business Services ("DBS") promulgated such rules, codified at Title 11 of the Rules of the City of New York ("RCNY") §§ 3-01 through 3-28, which took effect August 1, 1992, necessary to implement the purposes of this chapter.

These rules allowed the City agencies to give a preference in contract bidding to certified minority- or women-owned business enterprises (certified firms). 11 RCNY § 3-09(a) (repealed on September 1, 1994) provided

that an agency could state in the invitation to bid that if "the lowest responsible bid" is made by a person not a certified firm and another bid within the "target percentage" often percent of the lowest bid is from a certified firm, the agency shall refer that bid and the lowest responsible bid to the Mayor, or another official exercising power under § 313 of the City Charter, to determine whether in the "best interest" of the City the contract should be awarded to a certified firm.

The bid solicitation materials issued in connection with these contracts included the language that notified bidders that contracts were subject to being awarded following the procedures set forth in Section 313(b) of the City Charter and 11 RCNY § 3-09.

In November 1992, the City issued invitations to bid on two contracts to construct storm-sanitary sewers in Queens County, informing bidders that the contracts would be awarded subject to the above Rules.

Plaintiff submitted a bid of $195,836 on the first sewer contract. Although the bid was the lowest, the City awarded the contract to the third lowest bidder ($202,273), a joint venture that had sufficient minority and/or female ownership to qualify for the City's bidding preference.

On December 22, 1992, defendant Rogers wrote to the plaintiff that the contract would be awarded to a certified firm. On July 6, 1993, the contract was awarded, and on January 24, 1994, the City issued an Order to Commence Work.

On December 21, 1992, plaintiff submitted a bid of

$2,925,830 on another contract. Plaintiff's bid, initially the second lowest, became the lowest when the lower bid was withdrawn in April 1993. On April 22, 1993, defendant Rogers wrote plaintiff that the second contract would be awarded in accordance with the Rules to a certified joint venture which had submitted the sixth lowest bid of $3,094,444. The contract was officially awarded on July 16, 1993 and the City issued an Order to Commence Work on November 17, 1993.

Plaintiff served the City with a notice of claim on July 19, 1993.[1] On July 19, 1994, plaintiff sued the City in the United States District Court for the Eastern District of New York. Plaintiff sought $1,075,000 in lost profits and $10,000,000 in punitive damages.

By the time plaintiff had filed its action, work on both contracts was significantly, if not completely, finished. On the first contract, the City had paid out $152,777.61, more than seventy-five percent of the contract price. The second contract had been completed, and the City had paid out $2,982,150.58, ninety-five percent of the contract price.

The City moved for summary judgment pursuant to Fed R.. Civ. P. 56(c), asserting that plaintiff's laches barred its claim.

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[1] Section 50-e of the New York General Municipal Law provides that the filing of a notice of claim against a municipality is a condition precedent to the commencement of an action based on state law. N.Y. Gen Mun. Law § 50-e. See, Davidson v. Bronx Mun. Hosp., 64 N.Y. 2d 59, 61-62, 484 N.Y.S.2d 533 (1984). Filing a notice of claim does not obligate a party to commence a lawsuit.

DECISIONS BELOW

(1)

The District Court noted that laches is not simply another species of statute of limitations. In contrast to the statute of limitations, which fixes a definite time beyond which an action is barred, laches is an equitable defense applicable when a plaintiff unreasonably delayed bringing suit and the defendant has been prejudiced by the delay (A32).[2] While it recognized that some courts have said that the laches may not apply at an action at law but only in equity, the District Court found it was hard to see why his principle should be so, particularly in light of the merger of law and equity. Fed. R. Civ. P. 2.

The District Court found that when plaintiff learned that it would not receive the contracts and why, it had a variety of options. It could have sought an injunction in Federal Court or could have mounted a challenge in state court within four months in an Article 78.[3] In such a proceeding, plaintiff could have raised the constitutionality of the City's Rules (A37-39). Finding that on the first contract, more than a year passed after plaintiff learned it would not be awarded the contract and the order to

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[2] Numbers preceded by the letter "A" in parentheses refer to the page number of the Appendix to the Petition for a Writ of Certiorari.

[3] Article 78 of New York State's Civil Practice Law and Rules (CPLR) governs the bringing of the traditional common law writs of prohibition, mandamus and certiorari to review.

commence work, and in the second contract, almost seven months passed after plaintiff learned it would not be awarded the contract and the order to commence work, the District Court ruled that plaintiff's failure to file his civil rights lawsuit for lost profit damages after work on both contracts was either complete or nearly complete was unreasonable (A38-39). Plaintiff presented no evidence to excuse or explain its behavior (A39).

The prejudice to the City was manifest, stated the District Court. The City had paid out more than three million dollars, an amount it had no hope of getting back (A39). The District Court held that plaintiff's laches barred his § 1983 claims (A38-40).

(2)

The Court of Appeals reinstated plaintiff's state claims after holding that it would not allow laches to bar plaintiff's claim which was otherwise timely filed under § 1983's three-year statute of limitations period, borrowed from analogous state law (A14-15). Although it recognized that its ruling interfered with the state's prerogatives in awarding its public contracts and the public may have to "pay twice" if the court awarded damages, the Circuit Court claimed that the City acted at its own peril if it distributed its funds in a potentially unconstitutional manner (A20).

REASONS FOR GRANTING THE WRIT

A public contractor whose low bid is wrongfully rejected by a government entity and awarded to a higher bidder has standing to prosecute an action for injunction or mandamus. However, this standing under New York State law does not expand his inchoate bid solicitation into the vested right to the award of a public contract, the deprivation of which by an awarding authority is actionable in damages. The reasoning behind this view is that while giving standing to the individual bidder to maintain an equitable action may be desirable in furtherance of the bidding laws' purpose to protect public interests from arbitrary or wrongful government conduct, the enforcement powers granted should not elevate the bidder to a position he would not otherwise enjoy, and that permitting an action for damages in deprivation of any vested interests would not only be contrary to the public interest the bidding laws were designed to protect, but also usurp the role of government in the competitive bidding process.

In the case at bar, with regard to both public contracts at issue, appellant was notified, before the award of each contract, that each contract would not be awarded to the lowest bidder, but to a minority or women-owned business enterprise or qualified joint venture because the Mayor had determined that it was in the best interests of the City and pursuant to law. Although plaintiff had more than ample time to seek an injunction in Federal Court or mandamus to compel the City to comply with proper contract award procedures so that it could perform the contracts for which it was the lowest bidder, plaintiff, without explanation, chose to wait until long after much of

the work on both contracts had been completed and substantial payments made to the contractors before filing its civil rights lawsuit in Federal District Court. Plaintiff calculated his damages based on the lost profits he allegedly would have made if he had been awarded the contracts.

The defendants moved for summary judgment on the grounds that plaintiff's laches in bringing his claims barred his lawsuit. The Circuit Court ruled that laches may not be interposed as a defense to a civil rights action for damages that plaintiff reached by calculating its lost profits on the contracts.

By its determination, the United States Court of Appeals sanctioned plaintiff's delay and forever placed any municipality on the horns of a dilemma. Although plaintiff filed a notice of claim, it is clear from its subsequent lack of action that it had no intention of seeking through litigation the opportunity to perform the disputed contracts. Thus a municipality when confronted with such circumstances must decide if government needs should not be met until litigation is brought and the matter resolved (which may engender further litigation by the successful bidder); or should it rebid the contract in the hope that other litigation will not be forthcoming; or should it allow the contracts to be performed notwithstanding the possibility of outstanding litigation leading to double payment and waste of public funds. Although plaintiff offered no excuse for his delay in bring his civil rights claim, the public defendant may have to pay twice for the same construction projects as a result of plaintiff's delay.

The Circuit Court was unmoved by the facts that while plaintiff sought lost profits in its civil rights action for

contracts for which he had no vested rights, he made no attempt to secure the award of those contracts with remedies it had in both in state court and in federal court. By allowing plaintiff to pursue its civil rights suit on its relaxed time schedule, the Second Circuit sanctions the defeat of the purpose of public bidding laws and allows for damages for rights that were not vested.

The Court of Appeals for the Second Circuit reached this anomalous result by its rigid adherence to antiquated distinctions between law and equity. This view defies the purpose of the merger of law and equity found in the Federal Rules of Civil Procedure which grants the federal courts the power to fashion any remedy justified by the pleadings and proof. Moreover, the Circuit Court's decision marks a divergence from the holdings of other Circuit Courts and District Courts which sanction the use of laches as a defense in an action at law in order to allow the courts to fashion a just result that balances and accommodates the intersecting interests of the remedial purpose of the civil rights laws, state sovereignty and the availability of state and federal remedies by which a party may secure the rights that may otherwise be pursued by bringing suit pursuant the federal civil rights laws.

(1)

While an unsuccessful bidder in New York State has standing to maintain a proceeding to review the award of a contract in violation of a statute requiring that the contract go to the lowest bidder, this procedure was sanctioned only to ensure enforcement of the General Municipal Law § 103 which prescribes when and the manner in which a municipality shall request bids and award contracts. Stride

Contracting Corp. v. Board of Contract & Supply of the City of Yonkers, 181 A.D.2d 86, 581 N.Y.S.2d 446 (2nd Dept. 1992). The disappointed bidder has no cause of action for breach of contract. See e.g., Malloy v. City of New Rochelle, 198 N.Y. 402, 408-409, 92 N.E. 94 (1910). No prospective contractor, not even the low bidder, has a property interest in any contract. Eastway Construction Corp. v. City of New York, 762 F. 2d 243, 250 (2d Cir. 1985); Conduit & Foundation Corp. v. Metropolitan Authority, 66 N.Y. 2d 144, 148, 495 N.Y.S.2d 340 (1985). See also, 65 ALR4th 93, Public Contract Bids: Damages.

The reason behind this rule is two-fold: First, statutes that call for awards to go to the lowest responsible bidder are enacted for the benefit of the public, not rejected bidders. Seneca Mineral Co., Inc. v. County of Chautagua, 797 F. Supp 237, 239 (W.D.N.Y. 1992); Construction Contractors Association v. Board of Trustees, 192 A.D.2d 265, 267, 268 (2d Dept. 1993); Allen v. Eberling, 24 AD2d 594 (2d Dept. 1965). Disobedience of such provisions by a public officer may not be used by a disappointed bidder as a double source of punishment to the public body. If the low bidder were permitted to maintain such an action, then this disobedience to the statute would make the body public pay the difference between the lowest bid and the bid for which the contract was made, and also the profit that the lowest responsible bidder would have made if the statute had not been violated. 64 Am Jur 2d, Public Works and Contracts § 86, pp. 947-48. Second, an unaccepted bid is not a contract and can sustain no cause of action for its breach. Seneca Mineral Co., Inc. v. County of Chautagua, supra, 797 F. Supp at 239, citing, Carroll-Ratner Corp. v. City Manager of New Rochelle, 54 Misc.2d 625, 283 N.Y.S.2d 218 (Sup Ct Weschester Co.

1967), affd, 36 A.D.2d 795, 320 N.Y.S.2d 1015 (2nd Dept 1971).

In the case at bar, with regard to both contracts at issue, plaintiff was notified, before the award of each contract, that each contract would not be awarded to the lowest bidder because the Mayor had determined that it was in the best interests of the City and pursuant to law, to award the contracts to a minority or women-owned business enterprise or qualified joint venture. According to plaintiff's complaint, § 3-09 of the Rules of the City of New York authorizing contract awards to M/WBEs was void and unenforceable because of § 103 of General Municipal Law. Rather than seek an injunction or mandamus to compel compliance with proper contract award procedures as it saw them, plaintiff waited until long after much of the work on both contracts had been completed and substantial payments made to the contractors. See, Seabury Construction Corp. v. DEP., 160 Misc. 2d. 87, 607 N.Y.S.2d 1017 (Sup. Ct. N.Y. Co. 1994). See also, Funderburg Bldrs. v. Abbeville City Memorial Hospital, 467 F. Supp 821, 825 (D.S.C. 1979); Sutter Brothers Construction Co., Inc v. City of Leavenworth, 238 Kan 85, 87-88, 708 P.2d 190, 191-192 (1985). Since an injunction is the only adequate means of protecting the public interest, the integrity of the bidding process, and the rights of the individual bidder after a contract has been let, plaintiff's course of litigative conduct in seeking damages for the alleged violation of his civil rights will defeat the public purpose of the bidding laws. Indeed, plaintiff seeks damages in the amount of the anticipated profits he expected if he had been awarded the contract.

Recognizing the adverse impact on the bidding

process that the lawsuit would have were it to succeed, the City moved to dismiss plaintiff's claims on the ground that they were barred by laches because 1) it had delayed filing suit for an unreasonable and inexcusable length of time from the time plaintiff knew of its claim against the defendant, and 2) the delay operated to the prejudice of the defendant. Bott v. Four Star Corp., 807 F. 2d 1567, 1576 (Fed. Cir. 1986).

In its motion for summary judgment, the City demonstrated that plaintiff had waited many months after the contracts had been awarded and the issuance of orders to commence work had been issued and the work required by the contracts had been virtually completed before plaintiff filed his lawsuit. The letters from the City's Chief Procurement Officer, Michael Rogers, clearly placed plaintiff on notice that it was not to be awarded the subject contracts, said rejections being the basis in the complaint at bar. The City demonstrated in its motion that if plaintiff succeeded in his lawsuit, not only would the City and the public suffer significant economic prejudice, but the precedent would be set whereby the public interest in the bidding process would be soundly defeated again and again.

(2)

The flexibility that laches provides a court in protecting the interests of both parties finds full expression in the case of Soules v. Kauaians for Nukolii Campaign Committee, 849 F. 2d 1176 (9th Cir. 1988), a matter the District Court properly viewed as "the prototype of a situation demonstrating that it would be unwise to adopt a blanket rule that laches can only apply in an equitable action." In Soules, plaintiffs sought an order invalidating a

special election and damages under § 1983 on equal protection grounds.

The Circuit Court, without reaching the merits, denied plaintiff's claim for equitable relief on the ground of laches. Id. at p. 1180. The Circuit Court stated that in order to create an appropriate incentive to bring challenges to state elections when the defects are most easily cured, the law imposes a duty on parties having grievances based on discriminatory practices to bring their complaints forward for preelection adjudication. Id. The Circuit Court stated that "[a]lthough adequate explanation for failure to seek preelection relief has been held to exist where, for example, the party challenging the election had no opportunity to seek relief (citation omitted), if aggrieved parties, without adequate explanation, do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election." Id.

Turning to plaintiff's equal protection claim, the Circuit Court held for "much the same reasons" that it would not entertain the claim for damages. Id. at p. 1182. The Circuit Court reasoned that to permit a section 1983 damage action under the circumstances "where claimants have bypassed their potential preelection remedies without adequate explanation" would provide a "perverse incentive" for losing candidates to ignore the principal routes established to challenge an election "and to proceed instead to have the election reviewed in federal court in hopes of gaining monetary compensation." The Circuit Court was well aware of its duty to ensure that elections conform with constitutional standards. However, it saw compelling countervailing concerns in excessive federal interference with disputes for which the states had provided procedures

to resolve. In "this spirit of restraint," the Circuit Court declined to countenance "Section 1983 gloss" on plaintiff's equal protection claim for damages.

The parallels between the case at bar and Soules are clear and demonstrate a clear conflict between the Second and Ninth circuits.[4] As we noted at the outset, the bidding laws are for the public benefit, not rejected bidders. An unaccepted bid is not a contract and it cannot sustain a cause of action for its breach. Plaintiff could have sought an injunction in federal court (Sims Varner & Associates v. Blanchard, 794 F. 2d 1123, 1125 [6th Cir. 1986]), or it could have made a challenge within four months in an Article 78 proceeding. See, DiBerardino's Inc. v. Rome Consol. School District, 134 Misc.2d 188, 510 N.Y.S.2d 435 (Sup. Ct. Oneida Co. 1986). In such a proceeding, plaintiff could have raised the constitutionality of the rules he challenges as unconstitutional: See, Christ the King Reg. High School v. Culvert, 815 F. 2d 219, 224-225 (2d Cir. 1987). Plaintiff ignored the routes established to challenge the legality of the award of a contract.

Two decisions dismissing untimely suits because of the laches of disappointed bidders illustrate the propriety of the principles articulated in Soules. In DRT v.Collin County Texas, 845 F. Supp. 1159, 1162 (U.S.E.D. Texas 1994), DRT sought damages under 42 U.S.C. § 1983 claiming that it had a property right as the low bidder in a construction contract and was deprived of that right when the contract was awarded to the second lowest bidder. In DRT, the County awarded the contract on June 22, 1992, but plaintiff

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[4] In its opinion, the Second Circuit found the holding in Soules to be "unpersuasive" (A16).

did not file his lawsuit until January 19, 1993, almost seven months later. Id. The District Court found that plaintiff's proper course of action would have been "to seek an injunction, rather than to allow the County to proceed with letting of the contract and construction to begin." Id. The District Court properly observed that it is against public policy to allow disappointed bidders to pursue suits for damages after having failed to attempt to prevent the contract from being awarded to another contractor.

> To allow a disappointed bidder to file suit for damages after construction has begun and is well underway is contrary to the public interest. Allowing a disappointed low bidder to recover damages from the County would penalize the taxpayers of the County, who the laws were designed to protect (citation omitted). The taxpayers would be required to pay the disappointed low bidder for its lost profits, and then also pay the company receiving the bid the amount of over payment. Id. at p. 1163.

In granting the County summary judgment, the District Court, after noting the seven month delay between contract award and the initiation of the lawsuit, stated that "by allowing the County to proceed with construction and incur the expenses of the construction process, the County's position was changed to its detriment." DRT, said the Court, was "guilty of laches with regard to any property right of DRT in the bidding process for failing to seek an injunction." Id.

Similarly, in Carlson T.V. v. City of Marble, 612 F.

Supp 669, 672 (D.C. Minn. 1985), the District Court dismissed an unsuccessful bidder's lawsuit for damages that was filed after almost a year and a half after the construction began, and a year after construction had been completed. The District Court highlighted the facts that plaintiff was available to commence its litigation at all times and had presented no reasons for the delay. On the other hand, "[t]he delay was prejudicial to the defendants because the bid award was finalized and the construction was undertaken." Id. at p. 673. By the time the action was filed, the bid procedure could not be undone. Id. Cf., City and Borough of Juneau v. Breck, 706 P. 2d 313 (Alaska 1985).

(3)

The Circuit Court's assertion that an express limitation period reflects a legislative value judgment striking the appropriate balance between interests promoted by a particular statute and countervailing interests of repose is correct as general statement of legal principle. However, the facts at bar represents a compelling example where the application of laches before the expiration of the statute of limitations period, though novel, will deter disappointed bidders from ignoring the principle routes established to challenge contract awards while promoting a uniformity of result that provides protection for municipal interests and honors the historic wisdom of the value of repose. Cf., County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 262, 105 S.Ct. 1245, 1266 (Stevens dissenting in part). See also, Telink , Inc. v. U.S., 24 F. 3rd 42, 45-46 (9th Cir. 1994), citing, Alsop v. Riker, 155 U.S. 448, 460, 461, 15 S. Ct. 162, 166-167 (1894)..

The case at bar highlights the imperative and

necessity of granting municipalities repose after a suitable time after the award of contracts and the order to commence work has been issued. In New York, as in virtually any other municipality, claims of constitutional violations in the awarding of contracts can be brought to the attention of authorities by expedited procedures such as an application for a preliminary injunction or Article 78's or like procedures long before public funds are expended for performance of the contract. The salutary principle underlying expedited procedures is that if the disgruntled bidder is correct in its claim, then the contract can be awarded to the proper party and the public will not be required to pay twice for the same construction project. Under these circumstances, application of the laches defense ensures that prompt remedial action will be taken by the alleged disadvantaged party. The propriety of the application of the laches doctrine in an election such as Soules and ina bidding cases like the one at bar, is revealed by the fact that in those matters claimants were prohibited from proceeding to "federal court in hopes of gaining monetary compensation." because they had bypassed other remedies, without adequate explanation, that might grant them the relief to which they are entitled.

In particular, in the case at bar, to allow the decision to stand is to sanction and award plaintiff's unexplained delay where remedies were available to address its claims, while giving short shrift to the public fisc. From a wider perspective, to allow the Circuit Court's decision to stand is to sanction outdated distinctions between law and equity that find no consistency among the Circuits.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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March 4, 1997

*Counsel of Record

Supreme Court, U.S.
FILED

961437 MAR 10 1997

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

IVANI CONTRACTING CORP.,

Respondent,

- against -

THE CITY OF NEW YORK CITY, et al.,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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DECISION OF SECOND CIRCUIT A1

MEMORANDUM AND ORDER OF DISTRICT COURT A25

UNITED STATED COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 352 - August Term, 1996
(Argued: October 17, 1996 Decided: January 7, 1997)
Docket No. 95-9186

IVANI CONTRACTING CORPORATION,

Plaintiff-Appellant,

- v. -

THE CITY OF NEW YORK, DAVID N. DINKINS, in his former capacity as MAYOR of the CITY OF NEW YORK, and MICHAEL C. ROGERS, in his former capacity as CHIEF PROCUREMENT OFFICER OF THE CITY OF NEW YORK,

Defendants-Appellees.

Before:

NEWMAN, Chief Judge,
and McLAUGHLIN, Circuit Judge.*

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* Honorable J. Edward Lumbard withdrew from the panel shortly before oral argument, and the appeal is being disposed of by the remaining members of the panel, who are in agreement. See 2d Cir. R. § 0.14(b); Murray v. National Broadcasting Co., 35 F.3d 45, 47-48 (2d Cir. 1994), cert. denied 115 S.Ct. 734 (1995).

Plaintiff contractor appeals from an order of the United States District Court for the Eastern District of New York (Nickerson, J.) dismissing its complaint against Defendant City on the ground of laches. Plaintiff argues that laches is not a defense to its legal claims. It also asserts that the district court improperly dismissed its claim for punitive damages.

AFFIRMED in part, REVERSED in part, and REMANDED.

MICHAEL J. STRENK, Commack, NY, for Plaintiff-Appellant.

JULIAN L. KALKSTEIN, Assistant Corporation Counsel of the City of New York, New York, NY (Paul A. Crotty, Corporation Counsel of the City of New York, Larry A. Sonnenshein, Assistant Corporation Counsel of the City of New York, New York, NY, of counsel) for Defendants-Appellees.

McLAUGHLIN, Circuit Judge:

Ivani Contracting Corporation ("Ivani") appeals from an order of the United States District Court for the Eastern District of New York (Eugene H. Nickerson, Judge), dismissing its complaint in a civil rights action against the City of New York (the "City") on the ground of laches. The court also dismissed Ivani's claim for punitive damages as unsupported by the record. Ivani appeals, arguing that a laches defense is unavailable against its legal claims, and that the district court improperly dismissed its claim for punitive damages. For the reasons stated below, we affirm the order of the district court in part, reverse in part, and remand for further proceedings.

BACKGROUND

Under New York state law, all public contracts involving more than $10,000 shall be rewarded to the "lowest responsible bidder." N.Y. Gen. Mun. Law § 103.

In April, 1992, the city adopted § 3-09 of The Official Compilation of the Rules of New York City, providing that the City would award certain public contracts to contractors substantially owned by minorities or females ("M/WBE" contractors) -- even if those businesses were not the "lowest responsible" bidders -- so long as their bids fell within a designated percentage of the lowest responsible bid.

In November, 1992, the City invited bids on two contracts to construct sewers in Queens County. Ivani, a contractor owned by Italian males, submitted the lowest bids on both contracts, but was awarded neither.

Ivani submitted a bid of $195,836 on the first sewer contract. Although that bid was lowest, the City awarded the contract to the third-lowest bidder ($203,273), a joint venture between Vassallo Construction Corporation and Island Pavement Cutting Company that had sufficient minority and/or female ownership to qualify for the City's

bidding preference. The City informed Ivani by letter on December 22, 1992, that it would not receive the contract; officially awarded the contract to the M/WBE contractor on July 6, 1993; and issued an order to start work on January 24, 1994.

Ivani submitted a bid of $2,925,830 on the second (and much larger) contract. Again, although Ivani's bid was lowest, the City awarded the contract to the sixth-lowest bidder ($3,094,444), a joint venture between H.H.M. Associates, Inc., and Two Gals Development Corporation that also had sufficient minority and/or female ownership to qualify for the bidding preference. The City informed Ivani by letter on April 22, 1993, that it would not receive the contract; officially awarded the contract to the M/WBE contractor on July 16, 1993; and issued an order to commence work on November 17, 1993.

Ivani served the City with a notice of claim on July 19, 1993. Exactly one year later on July 19, 1994, it sued the City in the United States District Court for the Eastern District of New York. Ivani alleged that the City discriminated against it on the basis of race and/or gender by awarding the two public contracts for which Ivani had submitted the lowest bids to the M/WBE contractors. Ivani asserted claims under 42 U.S.C. §§ 1981, 1983, and 2000d, the Equal Protection Clauses of the United States and New York Constitutions, and N.Y. Gen. Mun. Law § 103. Ivani sought $1,075,000 in lost profits and $10,000,000 punitive damages.

By July, 1994, when Ivani filed its action, work on both contracts was significantly -- if not completely -- finished, and the City had paid out most of the contract prices to the contractors on both projects. In neither instance had Ivani attempted to stop the awarding of the

contract to the higher-bidding M/WBE contractor by initiating an Article 78 (p. 4) proceeding. See N.Y. C.P.L.R. § § 7801-06.

The City moved for summary judgment pursuant to Fed. R. Civ. P. 56(c), asserting that Ivani's laches barred its claims. The district court agreed. The court also found no evidentiary basis for punitive damages. Thus, the district court granted summary judgment to the City, and dismissed Ivani's complaint in its entirety.

Ivani now appeals, arguing that: (1) laches is unavailable against its legal claims for damages for civil rights violations; (2) in any event, laches should not apply on these facts; and (3) the district court improperly dismissed its claim for punitive damages.

DISCUSSION

We review the district court's grant of summary judgment de novo. Graham v. Henderson, 89 F.3d 75, 79

(2d Cir. 1996); Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., 967 F.2d 742, 746 (2d Cir. 1992).

A. Laches

Ivani argues that the district court erred in holding that laches could bar its claims. We agree.

As Justice Holmes has observed, "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). The doctrine of laches has a historical pedigree pre-dating the statutory enactment of periods of limitations. Even when there were no statutory periods, the Chancellor in Equity, the "King's Conscience," could withhold relief when the plaintiff's delay in coming to Equity was inordinate and had caused prejudice to the defendant.

Laches is "an equitable defense based on the . . . maxim vigilantibus non dormientibus aequitas subvenit (equity aids the vigilant, not those who sleep on their

rights)." Stone v. Williams, 873 F.2d 620, 623 (2d Cir.), cert. denied, 493 U.S. 959 (1989), vacated on other grounds, 891 F.2d 401 (2d Cir. 1989), cert. denied, 496 U.S. 937 (1990). It bars a plaintiff's equitable claim where he is "guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant." Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 804 (8th Cir. 1979), cert. denied, 446 U.S. 913 (1980); see also Gardner v. Panama R.R. Co., 342 U.S. 29, 30-31 (1951).

The first attempt at legislating a period of limitations is found in the statute of 32 Henry VIII (1541) and was restricted to actions involving real property. It was superseded by the statute of 21 James I, ch. 16 (1624), extending the limitation to personal actions as well as real. Modern statutes of limitations trace directly back to 1624, and embody the notion that fixing the periods for bringing damages actions is a legislative function that imposes

certainty and predictability upon how long a defendant should be subject to suit.

The Supreme Court long also recognized that, while the doctrine of laches survived as a further limitation upon granting relief in equity, "[l]aches within the term of the statute of limitations is no defense at law." United States v. Mack, 295 U.S. 480, 489 (1935). True, Mack preceded the "merger" of law and equity in the federal courts. See Fed. R. Civ. P. 2. But the Court reiterated this traditional rule much more recently, at least in dicta. In Oneida County v. Oneida Indian Nation of New York, 470 U.S. 226 (1985), the court found it unnecessary to reach the issue, but nonetheless volunteered that "application of the equitable defense of laches in an action at law would be novel indeed." Id. at 224-45 n.16. Justice Stevens, in a dissent, noted that, "[i]n deference to the doctrine of the separation of powers, the court has been

circumspect in adopting principles of equity in the context of enforcing federal statutes." Id. at 262 N.12 (Stevens, J., dissenting).

We have held -- without explication and citing only Mack -- that laches cannot bar a suit under the federal False Claims Act, see 31 U.S.C. § 231 et seq., because "[l]aches is not a defense to an action filed within the applicable statute of limitations." United States v. RePass, 688 F.2d 154, 158 (2d Cir. 1982); see also Morgan v. Koch, 419 F.2d 993, 996 (7th Cir. 1969) ("[w]here . . . a litigant is seeking to enforce federal and state rights in law only, the applicable statute of limitations controls rather than laches"). Citing (among diverse other cases) our decision in Repass, the Eighth Circuit has more cogently stated that "separation of powers principles dictate that federal courts not apply laches to bar a federal statutory claim that is timely filed under an express federal statute of

limitations." Ashley v. Boyle's Famous Corned Beef Co., 66 F.3d 164, 170 (8th Cir. 1995) (Title VII and Equal Pay Act claims); see also Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 586 (9th Cir. 1993) ("[b]ecause Congress provided a statute of limitations to govern ADEA actions . . . [those] claims cannot be barred by laches"), cert. denied, 510 U.S. (1109) (1994). An express limitations period "reflect[s] a legislative 'value judgment'" striking the appropriate balance between the interests promoted by the statute and countervailing interests of repose. Ashley, 66 F.3d at 169 (quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975)).

The prevailing rule, then, is that when a plaintiff brings a federal statutory claim seeking legal relief, laches cannot bar that claim, at least where the statute contains an express limitations period within which the action is timely.

Here, Ivani seeks no equitable remedy, but only money damages (that is, "legal" relief), on claims largely derived from specific federal statutes. But, the statutes upon which Ivani relies -- 42 U.S.C. § § 1981, 1983, and 2000d -- do not have express limitations periods; rather, they each borrow their limitations period from state law. See Holt v. KMI-Continental, Inc., 95 F.3d 123, 131 (2d Cir. 1996) (§ 1981); Eagleston v. Guido, 41 F.3d 865, 871 (2d Cir. 1994) (§ 1983), cert. denied, 116 S. Ct. 53 (1995); Egerdahl v. Hibbing Community College, 72 F.3d 615, 617-18 (8th Cir. 1995) (§ 2000d). The Ashley court, in a footnote, intimated (but did not hold) that the prevailing rule may not apply when a federal statute borrows its limitation period from state law:

> [W]hen Congress by its silence borrows the post analogous state statute of limitations for a federal claim, there is something of a federal legislative void. Thus, separation of powers principles are less affected by a judicial decision

> to superimpose the doctrine of laches on the borrowed state statute of limitations.

Ashley, 66 F.3d at 170 n.4.

Legislative silence on limitations periods is "a void which is commonplace in federal law." Wilson v. Garcia, 471 U.S. 261, 266 (1985) (internal quotations omitted). When Congress by such silence adopts the limitations period governing analogous state claims, it "incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement." Wilson, 471 U.S. at 271. It does so "to assure that neutral rules of decision will be available to enforce the [federal statute]." Id. at 269.

Congress's decision to incorporate state law, therefore, does not reflect indifference. Rather, Congress is thereby adopting a predetermined balance between competing policies that has the added virtue of promoting neutral rules of decision in a crucial area of law (civil

rights). A federal legislative decision to borrow a state statute of limitations for a federal substantive statute is, then -- just as is an express federal statute of limitations -- a legislative choice that separation of powers principles compel us to respect.

For the proposition that laches may apply even to Ivani's legal claims, the City relief on Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176 (9th Cir. 1988). In Soules, plaintiff challenged the results of a special election on constitutional grounds, seeking both equitable and legal relief. The Ninth Circuit held that the plaintiffs' equitable claims were barred by laches, and their damage claims were barred "[f]or much the same reasons." Id. at 1182. The court, however, never addressed the separation of powers principles set forth above, and relied instead on the special role of equitable principles in the election context. See id. at 1180; see also Gjersten v.

Board of Election Comm'rs, 791 F.2d 472, 478 (7th Cir. 1986). In any event, we find Soules unpersuasive in our case, particularly in light of the many cases recognizing that laches cannot bar legal relief under § 1983. See, e.g., Nilsen v. Moss Point, 674 F.2d 379, 388 (5th Cir. 1982) ("although the equitable part of a mixed [§ 1983] claim can be barred by laches, the legal part will be barred only by the statute of limitations"), vacated on other grounds, 701 F.2d 556 (5th Cir. 1983((en banc).

We also find Dickey v. Alcoa S.S. Co., 641 F.2d 81 (2d Cir. 1981), and Stone v. Williams, 873 F.2d 620 (2d Cir. 1989), both relied on by the district court, to be inapplicable. The district court noted that in those cases this Circuit "embraced [laches] to bar damage claims as well as those that are equitable," but, in both instances, this again disregards history.

Stone was vacated by a subsequent decision of this court. See Stone v. Williams, 891 F.2d 401 (2d Cir. 1991). And Dickey was an admiralty case. As Justice Story explained, there were originally "no prescribed limits beyond which, in the exercise of admiralty jurisdiction, the courts of the United States [could] not take cognizance of suits." Willard v. Dorr, 29 F. Cas. 1277, 1278 (C.C.D. Mass. 1823) (No. 17, 680); see also Uisdean R. Vass & Xia Chen, The Admiralty Doctrine of Laches, 53 La. L. Rev. 495, 497-98 (1992). Admiralty suits were governed by "presumptions. . . which are equally fatal to a recovery." Willard, 29 F. Cas. at 1278. Laches was one of them. Since Willard, "laches has immemorially been applied to admiralty claims to determine whether they have been timely filed." DeSilvio v. Prudential Lines, Inc., 701 F.2d 13, 15 (citing The Key City, 81 U.S. 653, 660

(1872)); see also Usher v. M/V Ocean Wave, 27 F.3d 370, 371-72 (9th Cir. 1994).

By the beginning of the 1980s, federal law expressly provided a three-year limitations period for personal injuries at sea, see 46 U.S.C.App. § 688, and a two-year limitations period for death on the high seas, see former 46 U.S.C. § 763 (since repealed). See Usher, 27 F.3d at 371. But "[o]ther claims . . . were [still] governed by . . . laches" until 1980, when 46 U.S.C.App. § 763a imposed a three-year statute of limitations on maritime tort claims in general. Id. Because Dickey was decided before § 763a, that case was governed by the historical rule in admiralty that "the delay which will defeat . . . a suit must in every case depend on the particular equitable circumstances of that case." The Key City, 81 U.S. at 660; see also Czaplicki v. The Hoegh Silvercloud, 351 U.S. (p. 11), 533 (1956). Dickey is therefore not dispositive.

Nor are we persuaded that a different rule should apply just because municipal contracts are involved. We appreciate that a judgment in favor of a disappointed bidder: (1) interferes to some degree with the state's prerogatives in awarding its public contracts; and (2) may force the citizens to "pay twice" if the court awards damages. See DRT Mechanical Corp. v. Collin County, 845 F. Supp. 1159, 1163 (E.D. Tex. 1994).

Because § 1983 was created specifically to provide a remedy where a state or municipality violates a plaintiff's federal rights, the "state prerogative" argument pales:

> Section 1983 was . . . a product of a vast transformation from the concepts of federalism . . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.

Mitchum v. Foster, 407 U.S. 225, 242 (1972) (internal quotations omitted).

Although the public may "pay twice" for the mistake, we cannot allow the City to distribute its largess in a potentially unconstitutional manner, and then chant the mantra of "public interest" when called to account for the violation that its process precipitated. It should also not pass unnoticed that the City chose to implement the challenged contracts, and even to pay out on them, despite that fact that Ivani had already declared its intent to sue by filing its notice of claim under N.Y. Gen. Mun. Law § 50-i and 50-e.

This calculus is unchanged by the availability of quick state-law injunctive relief. Although Ivani could have brought an Article 78 proceeding to challenge the city's contract award, see N.Y. C.P.L.R. § § 7801-06, requiring Ivani to do so, in state court and within the four-month

limitations period applicable to such proceedings, would undermine the broad compensatory goals of § 1983. Cf. Felder v. Casey, 487 U.S. 131, 152-53 (1988) (state notice-of-claim statutes cannot bar § 1983 relief). While it is hornbook law that the availability of effective legal relief will bar an equitable claim, see United States v. State of New York, 708 F.2d 92, 93-94 (2d Cir. 1983), cert. denied, 466 U.S. 936 (1984), few would suggest that available equitable relief will bar a legal claim. We decline to announce such a rule here, particularly where the equitable relief is found in restrictive state law, and the legal relief is based upon a broad federal civil rights statute.

We therefore cannot allow laches to bar Ivani's claim, which was otherwise timely filed under § 1983's three-year limitations period as borrowed from analogous state law. See Murphy v. Lynn, 53 F.3d 547, 548 (2d Cir.

1995). Ivani's federal claims are reinstated, subject to further proceedings consistent with this opinion.[1]

The district court dismissed Ivani's state claims on jurisdictional grounds because it had dismissed all Ivani's federal claims. See Albany Ins. Co. v. Esses, 831 F.2d 41, 45 (2d Cir. 1987). Because we now reinstate Ivani's federal claims, we also reinstate Ivani's state claims, again subject to further proceedings consistent with this opinion.

B. Punitive Damages

Ivani also maintains that the district court erred by dismissing its claims for punitive damages. We disagree.

Ivani concedes that it cannot recover punitive damages against the City itself. See City of Newport v.

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[1] Because we hold that laches does not apply to Ivani's legal claims, we do not reach the question whether the elements of laches, were it to apply, could be proven in this case.

Fact Concerts, Inc., 453 U.S. 247, 271 (1981). It nonetheless asserts that it can collect punitive damages from the municipal officers it has sued. Ivani, however, has sued those officers in their Official capacity only, so they enjoy the same immunity from punitive damages as the City. See Brandon v. Holt, 469 U.S. 464, 471-73 (1985) (suits against government officials in their official capacity are treated as suits against the government itself); Greiner v. City of Greene, 811 F. Supp. 796, 800-01 (N.D.N.Y. 1993). Even if Ivani had sued those officials in their individual capacities, the record is devoid of evidence of the "evil motive or intent," or "callous indifference" that is essential to an award of punitive damages. See Smith v. Wade, 461 U.S. 30, 56 (1983).

CONCLUSION

We hold that: (1) laches is not available to bar Ivani's legal claims for damages under § 1983; and (2) the

district court properly dismissed Ivani's claims for punitive damages. The judgment of the district court is therefore AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

MEMORANDUM AND ORDER OF DISTRICT COURT

No. 94 CV 3402

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IVANI CONTRACTING CORP.,

Plaintiff,

- against -

THE CITY OF NEW YORK CITY, DAVID N. DINKINS, in his former capacity as MAYOR OF THE CITY OF NEW YORK, and MICHAEL C. ROGERS, in his former capacity as CHIEF PROCUREMENT OFFICER OF THE CITY OF NEW YORK,

Defendants.

MEMORANDUM AND ORDER

A P P E A R A N C E S:

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Counsel for Defendants

NICKERSON, District Judge:

Plaintiff, a construction corporation owned by men of Italian descent, brought this action against the City of New York (the City), David N. Dinkins, the former Mayor, and Michael C. Rogers, the former Chief Procurement Officer. The complaint asserts claims for damages under the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, the Equal Protection Clauses of the United States and New York Constitutions, and § 103 of the General Municipal Law of New York.

Plaintiff says that the defendants discriminated against it on the basis of race and/or gender by awarding contracts for which it had submitted the lowest

bids to contractors owned by minorities and/or women. Plaintiff seeks $1,075,000 in damages for lost profits, $10,000,000 in punitive damages, and legal fees, costs, and interest.

The court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367. Defendants move for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, asserting that plaintiff's laches bar the claims.

I

The undisputed relevant facts are, in substance, the following. Prior to its repeal in 1994, section 3-09 of The Official Compilation of the Rules of the City of New York (the Rules) allowed the city agencies to give a preference in contract bidding to certified minority- or woman-owned business enterprises (certified firms). The section provided that an agency could state in the invitation

to bid that if "the lowest responsible bid" is made by a person not a certified firm and another bid within the "target percentage" of the lowest bid is from a certified firm, the agency shall refer that bid and the lowest responsible bid to the Mayor, or another official exercising power under § 310 of the City Charter, to determine whether in the "best interest" of the City the contract should be awarded to the certified firm.

Section 3-09 defined the "target percentage" as ten percent, with the proviso that the agency could vary the target if it documented its reasons for doing so and gave appropriate notice in the invitation to bid.

In November 1992, the City issued invitations to bid on two contracts to construct storm-sanitary sewers in Queens County, informing bidders that the contracts would be awarded subject to the above Rules.

On December 9, 1992, plaintiff submitted a bid of $195,836 on one of the contracts (the first contract). Although that bid was the lowest, the contract went to the third lowest bidder, a certified firm that had submitted a bid of $202,273.

On December 22, 1992, defendant Rogers wrote plaintiff that the contract would be awarded to the certified firm. On July 6, 1993, the contract was awarded, and on January 24, 1994 the City issued an Order to Commence Work. Plaintiff says that it complained to City officials, but does not say how or when it did so. It claims that it would have had a profit of $75,000 on the contract.

On December 21, 1992, plaintiff submitted a bid of $2,925,830 on the other contract (the second contract). Plaintiff's bid, initially the second lowest, became the lowest when a lower bid was withdrawn in April 1993. On April 22, 1993, defendant Rogers wrote

plaintiff that the second contract would be awarded in accordance with the Rules to a certified joint venture between H.H.M. Associates, Inc. and Two Gals Development Corp. (the joint venture), which had submitted the sixth lowest bid, $3,094,444.

On May 27, 1993, the second contract, involving a project receiving federal funding, was awarded to the joint venture. On July 16, 1993, plaintiff filed a claim and demand with the New York City Comptroller, seeking $1,000,000 in lost profits and $10,000,000 in punitive damages. On November 17, 1993, the City issued the joint venture an Order to Commence Work.

Plaintiff filed its present complaint on July 19, 1994, and defendants agreed on October 17, 1994 to waive service of summons. Defendants say that by that time the first contract was almost entirely complete, and the City had paid $152,777.61, more than seventy-five percent

of the contract price. The second contract had been completed, and the City had paid $2,982,150.58, ninety-five percent of the contract price.

II

Under Federal Rule of Civil Procedure 56(c) the court will grant summary judgment if the evidence offered shows that there is no genuine issue as to any material fact and that the movants are entitled to a judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). On the motion the court views the record in the light most favorable to the non-movant and resolves all ambiguities and draws all reasonable inferences against the movants. See United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962); Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 57 (2d Cir. 1987).

Defendants say that plaintiff was guilty of such laches as to bar the action.

Although the statute of limitations for a claim under § 1983 is three years, see Murphy v. Lynn, 53 F.3d 547, 548 (2d Cir. 1995), and the complaint was filed within that period, defendants urge that the action should be dismissed because of plaintiff's delay in seeking injunctive relief until defendants had paid more than $3 million on the contracts.

Laches is not simply another species of statute of limitations. In contrast to a statute of limitations which fixes a definite time beyond which an action is barred, Gardner v. Panama Railroad Co., 342 U.S. 29, 31-32 (1951), laches is an equitable defense applicable when a plaintiff has "unreasonably" delayed in bringing suit and the defendant has been "prejudiced" by the delay. Stone v. Williams, 873 F.2d 620, 624-25 (2d Cir.), cert. denied,

493 U.S. 959 (1989); Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 714 (2d Cir. 1993), reversed on other grounds, _ U.S. __, 115 S.Ct. 1671 (1995).

The purposes served by a statute of limitations are thus not coextensive with those of laches. In determining whether to dismiss a case for laches the court must weigh both the reasons for the delay and the extent of the prejudice to the defendant. Stone, 873 F.2d at 625.

Although one district court in this circuit has held that laches "may be raised as a bar for both injunctive relief and money damages," see Imagineering, Inc. v. Van Klassens, Inc., 851 F.Supp. 532, 535 (S.D.N.Y. 1994), aff'd in part and vacated in part, 53 F.3d 1260 (Fed. Cir.), cert. denied, __ S.Ct. __, 1995 WL 454937 (Oct. 2, 1995), others have said that the laches calculus may not be made in an "action at law" but only in an "equity" case. See, e.g., Golotrade Shipping and Chartering, Inc. v. Travelers

Indemnity Co., 706 F.Supp. 214, 220 (S.D.N.Y. 1989); FDIC v. Schumacher, 660 F.Supp. 6, 10 (E.D.N.Y. 1984); Grant Airmass Corp. v. Gaymar Industries, Inc., 645 F.Supp. 1507, 1515 (S.D.N.Y. 1986).

It is hard to see why in principle this should be so, particularly in the light of the merger of law and equity (Federal Rule of Civil Procedure 2). Just as fraud, an "equitable" defense, may defeat a claim in an action at law, e.g., in a suit for breach of contract, so laches, an equitable defense, should be likewise be available where damages are sought in other kinds of cases.

In any event, the Court of Appeals for the Second Circuit, without explicitly discussing whether or not laches applies in an "action at law," has embraced that doctrine to bar damage claims as well as those that are equitable. See Dickey v. Alcoa S.S. Co., 641 F.2d 81 (2d Cir. 1981); Stone v. Williams, supra. The Second Circuit

has apparently never suggested that the doctrine is restricted to what would once have been called an "equitable" proceeding. Cases such as New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 584-85 (2d Cir. 1989), which "relegated" the plaintiff to a damage remedy, did so where the prejudice to the defendant by issuance of an injunction would have been enormous and the plaintiff's damages were relatively meager.

Perhaps the prototype of a situation demonstrating that it would be unwise to adopt a blanket rule that laches can apply only in an equitable action is shown in Soules v. Kauaians for Mikolii Campaign Committee, 849 F.2d 1176 (9th Cir. 1988). There the plaintiffs sought both an injunction and damages under § 1983, claiming on equal protection grounds that a special election was invalid. The circuit court, without reaching the merits, held the demand for an injunction barred by

laches. The court also held that for "much the same reasons" it would not entertain the claim for damages because plaintiffs, having bypassed their available chance to seek an injunction before the election, were barred by laches from seeking damages. The delay in seeking judicial relief caused prejudice to the defendant, to say nothing of the public interest.

Two district court decisions from other circuits are on point. Indeed, ART Mechanical Corp. v. Collin County, 845 F.Supp. 1159 (E.D. Tex 1994), involves facts strikingly similar to those present here. Collin County, Texas awarded a construction contract to the second lowest bidder, rejecting the protest of plaintiff, the lowest bidder. Some six months thereafter, plaintiff sought damages under § 1983 for violation of its due process rights. By that time construction was "well underway." The court, assuming arguendo that plaintiff had a right to

require the county to reopen the bidding, held that action barred by laches because plaintiffs had unreasonably delayed and failed to seek an injunction, to the detriment of the county which had changed its position.

The court in Carlson T.V. v. City of Marble, 612 F.Supp. 669 (D.C. Minn. 1985), made a comparable holding. In that case the city rejected plaintiff's low bid to construct a cable television system and accepted a higher bid. Almost a year after the construction was completed plaintiff brought suit claiming, among other things, damages under the antitrust laws. The court, assuming arguendo that plaintiff had an antitrust claim, held that because of plaintiff's unreasonable delay and the resulting prejudice to the city the claim was barred.

In the present case when plaintiff learned it would not receive the contracts and the reason why, it had a variety of options. It could have sought an injunction in

a federal court, or it could have made a challenge within four months in an Article 78 proceeding. See DiBernadino's, Inc. v. Rome Consol. Sch. Dist., 134 Misc.2d 188, 510 N.Y.S.2d 791 (Sup.Ct. 1986). In such a proceeding, it could have raised the constitutionality of the Rules. See Press v. County of Monroe, 50 N.Y.2d 695, 701-02, 409 N.E.2d 870, 872-73 (1980) (courts will consider a claim attacking the constitutionality of a legislative enactment by converting Article 78 proceedings into a declaratory judgment action "or other appropriate proceeding.")

Plaintiff had the opportunity to pursue either avenue. More than six months passed between the time that plaintiff learned that it had not received the first contract and the time that the contract was officially awarded. Another six months passed after the award and before issuance of the Order to Commence Work. More than one

month passed between the time that plaintiff learned that it would not receive the second contract and the time that it was officially awarded. Almost six months elapsed between the awarding of this contract and the issuance of the Order to Commence Work. Plaintiffs's failure to seek an injunction until the work on both contracts was either complete or almost complete was unreasonable. Plaintiff has presented no evidence sufficient to excuse or explain its behavior.

The prejudice to defendants is manifest. They had paid out more than three million dollars, an amount they have no hope of getting back. The parties awarded the contracts were entirely innocent, and the contracts were by no means void because awarded in contravention of bidding rules. D'Angelo v. Cole, 67 N.Y.2d 65, 70, 499 N.Y.S.2d 900, 903, 490 N.E.2d 819,

823 (1986). The awardees were not guilty of fraud or other illegality.

III

Plaintiff seeks punitive damages from all defendants. Because defendants have not shown that plaintiff's delay prejudiced their ability to pay punitive damages, the court will assume, arguendo, that plaintiff's laches does not bar punitive damages claims. On that assumption, the court holds the City immune from such claims under 42 U.S.C. § 1983. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S.Ct. 2748, 2762 (1981).

To obtain punitive damages in a § 1983 action against public officials, plaintiff must show that defendants' conduct was motivated by evil motive or intent or bespoke reckless or callous indifference to the federally protected rights of others. Smith v. Wade, 461 U.S. 30,

56, 103 S.Ct. 1625, 1640 (1983). Plaintiff has presented no evidence to suggest any of these things.

IV

Having decided to dismiss the federal claim, the court will also dismiss the claims under New York State law for violation of § 103 of the General Municipal Law and abuse of discretion. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (1966); Albany Ins. Co. v. Esses, 831 F.2d 41, 45 (2d Cir. 1987).

V

Defendants' motion for summary judgment is granted as to plaintiff's federal claims. Plaintiff's pendent state law claims are dismissed.

SO ORDERED

Eugene H. Nickerson,
UNITED STATES DISTRICT JUDGE

Dated: Brooklyn, New York
October 27, 1995